

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No: 5:11-CV-00214-BO

CAPITOL COMMISSION, INC.,)
)
 Plaintiff,)
)
vs.)
)
CAPITOL MINISTRIES,)
)
 Defendant.)
)
CAPITOL MINISTRIES,)
)
 Third-Party Plaintiff,)
)
vs.)
)
JOHN E. ANDERSON, JR., GEORGE)
H. JACKSON, JAMES E. YOUNG, and)
DANIEL FILE,)
)
 Third-Party Defendants.)

ORDER

This matter is before the Court on the defendant's motion for leave to amend counterclaims and third-party complaint, dismiss all claims against John Anderson and George Jackson and for an extension of the deadline for dispositive motions [DE 91]. For the following reasons, the motion for leave to amend is GRANTED; the motion to dismiss claims against Anderson and Jackson is GRANTED and the claims against Anderson and Jackson are dismissed with prejudice, and the motion for an extension of the deadline is DENIED as moot.

DISCUSSION

Defendant's motion to voluntarily dismiss all claims with prejudice against third-party defendants John Anderson and George Jackson is uncontested. Pursuant to Federal Rule of Civil Procedure 15, this Court freely gives its leave to amend defendant's claims against Anderson and Jackson. All claims against third-party defendants Anderson and Jackson are hereby dismissed with prejudice.

Defendant motioned to extend the deadline for dispositive motions. Both parties have fully briefed cross motions for summary judgment at this date. Accordingly, the motion to extend the deadline is dismissed as moot.

Plaintiff and third-party defendants do not object to the substance of defendant's proposed amendments to its counterclaims and third-party complaint. However, they argue that the claims defendant dropped in its proposed amendments should be dismissed with prejudice due to defendant's "excessive delay" and "lack of diligence" in addition to "the expenses and efforts" the dropped claims cost the plaintiffs and third-party defendants. This Court disagrees.

A motion for voluntary dismissal without prejudice should not be denied absent unfair prejudice to the defendant. *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). In evaluating motions for voluntary dismissal without prejudice, a district court considers: 1) the opposing party's effort and expense in preparing for trial; 2) excessive delay or lack of diligence on the part of the movant; 3) insufficient explanation of the need for dismissal; and 4) the present stage of the litigation. *See Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 358 (10th Cir.1996); *Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir.1987).


Here, plaintiff and third-party defendants point to no actual prejudice they will suffer if the dropped claims are dismissed without prejudice. They have already briefed their motion for summary judgment. The issues dropped voluntarily here will not be eligible to be tried later under the principles of *res judicata*. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“[u]nder *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action”). Defendant has not excessively delayed its motion to amend nor exhibited a lack of diligence. Defendant seeks to amend in response to the facts discovery revealed. It filed to do so a month after the close of discovery. Plaintiff and third-party defendants’ claim that the dropped claims were frivolous or were a bad faith attempt to harass ring hollow. Defendant’s motion for leave to file is granted, and the claims that it no longer pursues in its amended counterclaim and third-party complaint are dismissed without prejudice.

CONCLUSION

For the forgoing reasons, defendant’s motion for leave to amend counterclaims and third-party complaint is GRANTED. All claims against John Anderson and George Jackson are hereby DISMISSED with prejudice. Defendant’s motion for an extension of the deadline for dispositive motions is DENIED as moot. The clerk is directed to file defendant’s amended counterclaims and third-party complaint.

SO ORDERED.

This the 26 day of September, 2013.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE